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No. 06-850

In the Supreme Court of the United States

CINERGY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) reasonably construed its regulations defining the statutory term "modification" for purposes of the New Source Review (NSR) program to measure emissions increases based on total annual emissions.

2. Whether the courts have jurisdiction in this civil enforcement action to adjudicate petitioners' contention that the Clean Air Act (CAA) requires EPA to interpret its NSR regulations to measure emissions increases based solely on increases in the hourly emissions rate.

3. Whether the CAA requires EPA to measure emissions increases for purposes of the NSR program the same way it has historically calculated them for purposes of the New Source Performance Standards program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 458 F.3d 705. The opinion of the district court (Pet. App. 9a-20a) is reported at 384 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2006. On November 6, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 15, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil enforcement action, the United States alleged that petitioners Cinergy Corp., Cinergy Ser-

vices, Inc., PSI Energy, Inc., and Cincinnati Gas & Electric Co. failed to comply with the New Source Review (NSR) requirements of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, when they undertook massive construction projects to refurbish coal-fired power plants in Indiana and Ohio. The district court upheld the Environmental Protection Agency's (EPA's) interpretation of its own regulations as requiring that emissions increases be calculated on an actual, annual basis for purposes of determining whether a project is a "modification" subject to NSR. On interlocutory appeal, the court of appeals affirmed.

1. The CAA directs EPA to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of some air pollutants. 42 U.S.C. 7408, 7409; *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462 (2001). Each State must develop a "State implementation plan" (SIP) to achieve and maintain the NAAQS. 42 U.S.C. 7410; *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249-250 (1976).

The CAA establishes various other programs to protect air quality. The NSR program consists of a Prevention of Significant Deterioration (PSD) program that seeks to prevent a significant decline of air quality in areas that already meet ambient air quality standards, and a nonattainment program for areas not satisfying those standards.[1] See 42 U.S.C. 7470-7479, 7501-7508. The NSR program imposes various requirements that must be satisfied when certain emissions sources are "constructed." 42 U.S.C. 7475(a). Enacted in 1977, the

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[1] In this enforcement action, the United States has alleged violations of both the PSD and nonattainment components of the NSR program. Because the programs do not differ in any respect material here, this brief cites only the PSD provisions.

NSR provisions define "construction" to include "modification," which is defined in turn by reference to the statutory definition of "modification" applicable to the preexisting New Source Performance Standards (NSPS) program. 42 U.S.C. 7479(2)(C), 7501(4). The NSPS provisions, enacted in 1970, define "modification" to be "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

Although NSR and NSPS share a statutory definition of the term "modification," EPA has interpreted aspects of that definition differently for the two programs. By statute, NSR applies to the construction or modification of "major emitting facilit[ies]" or "major stationary sources." 42 U.S.C. 7475(a), 7479(1), 7502(c)(5), 7503. EPA's implementing regulations require a preconstruction permit for the construction of any "major stationary source" or "major modification," 40 C.F.R. 52.21(i), and define "major modification" to include "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act," 40 C.F.R. 52.21(b)(2)(i).[2]

The inquiry under that definition first requires identification of a "physical change in or change in the method of operation." 40 C.F.R. 52.21(b)(2)(i). At that step of the inquiry, there is an "hours of operation" exclusion, which provides that "[a] physical change or

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[2] Like the petition, this brief cites to the 1987 recodification of EPA's regulations unless otherwise indicated. See Pet. 3 n.2.

change in the method of operation shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 52.21(b)(2)(iii)*(f)*.

If there is a physical or operational change, the next question is whether that change would result in a significant "net emissions increase." 40 C.F.R. 52.21(b)(2)(i). Under the regulations, a net emissions increase is an "increase in actual emissions from a particular physical change or change in method of operation at a stationary source." 40 C.F.R. 52.21(b)(3)(i)(*a*). Pre-change "actual emissions" equal "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." 40 C.F.R. 52.21(b)(21)(ii). Actual emissions are "calculated using the unit's actual operating hours, production rates and types of materials processed, stored, or combusted during the selected time period." *Ibid.*

The NSPS regulations, by contrast, provide that a "modification" is "any physical or operational change * * * which results in an increase in the emission rate to the atmosphere of any pollutant." 40 C.F.R. 60.14(a). The "emission rate" is the maximum hourly emissions from the relevant piece of equipment operating at its maximum achievable capacity, and is "expressed as kg/hr." 40 C.F.R. 60.14(b). Because it considers only maximum hourly rates, the NSPS test is not triggered by changes that increase emissions due only to increased hours of operation.

2. The United States brought suit against petitioners for failing to comply with NSR requirements in conducting certain refurbishment projects. The district court granted summary judgment for the United States on the question how to determine whether a physical or

operational change would result in an emissions increase for purposes of the PSD program. Pet. App. 9a-20a.

The district court rejected petitioners' argument that Congress required EPA to define "modification" for purposes of PSD in the same manner it had defined "modification" for purposes of NSPS. Pet. App. 16a-17a. The court concluded that Congress did not "intend[] to incorporate the regulatory definition" of modification under NSPS into the statute; that Congress "did not limit the EPA's authority to further define 'modification' in the regulations as it deemed fit to serve the purposes of the PSD program"; and that "nothing about the EPA's definition of 'modification' [for the PSD program] contradicts the statutory definition." *Ibid.*

The district court further upheld EPA's reading of its own PSD regulations, and rejected petitioners' argument that, under those regulations, emissions increases must be measured solely on an hourly basis, such that emissions increases could result only from an increase in the hourly rate of emissions, as opposed to an increase in the number of hours a plant is expected to be operated over the course of a year. Pet. App. 17a-20a. The court explained that under EPA's regulations, PSD requirements are triggered by a "major modification," which is a change causing "a significant net increase in a unit's 'actual emissions.'" *Id.* at 18a (quoting 45 Fed. Reg. 52,698 (1980)). Because actual emissions are measured using a unit's "actual operating hours and production rates," the court determined that "if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase." *Ibid.* The court further explained that although increased hours of operation are excluded when determining whether there has been a physical or

operational change, they are not excluded when determining whether such a change has increased the plant's emissions. *Id.* at 19a.

3. The Seventh Circuit affirmed. Pet. App. 1a-8a. Examining the regulatory definitions of "major modification" and "significant net emissions increase," the court concluded:

> Since both the base emissions rate from which a significant increase is calculated, and the amount of the increase, are in terms of tons per year rather than per hour, the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered.

Id. at 3a. The court rejected petitioners' argument that calculating emissions using "actual operating hours" requires EPA to use a constant, representative number of operating hours to calculate both pre- and post-change emissions, thus limiting increases to changes that result in an increase of the hourly emissions rate. See *ibid.* Rather, the court concluded that "'actual operating hours' is more naturally read to mean the total number of hours that the plant is in operation." *Ibid.* The court also found sufficient policy reasons supporting EPA's interpretation to "scotch the argument that the interpretation produces such outlandish consequences that it must be incorrect." *Id.* at 5a.

The court of appeals then turned to petitioners' "principal argument": that "Congress required that the regulation define 'modification' as a change in the hourly emissions rate." Pet. App. 5a-6a. The court of appeals concluded that, "[s]ince the regulation does not define it so, this seems an attack on the validity of the regulation rather than an argument about its meaning." *Id.* at 6a.

Because only the D.C. Circuit has "jurisdiction to review the validity of nationally applicable regulations issued pursuant to the Clean Air Act," the court concluded that petitioners' challenge is "beyond the jurisdiction of a regional circuit to resolve." *Id.* at 2a, 6a (citing 42 U.S.C. 7607(b)(1)). The court noted that the Fourth Circuit had "stepped out of bounds" in *United States* v. *Duke Energy Corp.*, 411 F.3d 539 (2005), cert. granted, 126 S. Ct. 2019 (2006), by adjudicating the same statutory argument. Pet. App. 7a.

The court of appeals nevertheless proceeded, in the alternative, to address petitioners' statutory argument and found it "unconvincing." Pet. App. 6a. The court held that Congress's use in the PSD program of a cross-reference to the *statutory* NSPS definition of "modification" did not "incorporate the agency's *regulatory* definition of modifications under the New Source Performance Standards into the provisions relating to the Prevention of Significant Deterioration program." *Ibid.* (emphasis added). The court explained that "[t]he same word can mean different things in the same statute," and found that is "certainly the case with a vague word like 'modification,' and all the more when the statutory provisions that contain the word were enacted by different Congresses for different purposes." *Id.* at 7a. While the NSPS and PSD statutes both define modification to be a physical change in a plant that results in an increase in emissions, the court explained that the programs

> are silent on whether the increase is in the hourly rate of emissions or in some other rate. The task of deciding was left to the EPA. There was nothing to require that it flesh out the vague statutory meaning in the identical way in different parts of the Clean Air Act adopted years apart and reflecting, to an ex-

tent anyway, different philosophies of pollution control.

Id. at 8a.

ARGUMENT

The questions presented in this case are already before this Court in *Environmental Defense* v. *Duke Energy Co.*, No. 05-848, which was argued on November 1, 2006, and provides a sufficient vehicle for resolving those questions. Because the petition is interlocutory, this Court should deny review at this time. Alternatively, this Court should hold the petition pending the decision in *Duke Energy*, and then dispose of it as appropriate in light of that decision.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals affirmed the district court's ruling that the PSD regulations measure emissions increases based on annual, rather than hourly, emissions. Pet. App. 1a-8a. The court of appeals did not, however, finally resolve EPA's civil enforcement action. Rather, it remanded for further proceedings in the district court, where a variety of issues remain to be resolved. See generally *id.* at 12a-13a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

Following denial of the petition, the district court would have authority to apply this Court's upcoming decision in *Duke Energy*, see, *e.g.*, *Cameo Convalescent Ctr.* v. *Percy*, 800 F.2d 108, 110 (7th Cir. 1986), and petitioners could seek certiorari from any adverse final judgment, see, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Accordingly, the most efficient course would be to deny review at this time.

2. The court of appeals' decision is correct.

a. For purposes of the PSD program, EPA's regulations measure emissions increases based on annual, not hourly, emissions.

i. Those regulations require a preconstruction permit for the construction of, as relevant here, any "major modification." 40 C.F.R. 52.21(i). The regulations define "major modification" to include "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase." 40 C.F.R. 52.21(b)(2)(i). A "[n]et emissions increase," in turn, is an "increase in actual emissions." 40 C.F.R. 52.21(b)(3)(i)(*a*).

As the court of appeals correctly recognized, the PSD definition of "actual emissions" measures emissions "in tons per year," not per hour. 40 C.F.R. 52.21(b)(21)(ii); Pet. App. 3a. Whether a net emissions increase is "significant" is also measured in "tons per year." 40 C.F.R. 52.21(b)(23)(i). Thus, the PSD regulations plainly require consideration of actual, annual emissions—not hourly emissions. Other courts have likewise recognized that the PSD regulations, unlike the NSPS regulations, focus on increases in actual annual, not hourly, emissions. See *New York* v. *United States EPA*, 413 F.3d 3, 15 (D.C. Cir. 2005); *Wisconsin Elec.*

Power Co. v. *Reilly*, 893 F.2d 901, 915 (7th Cir. 1990) (*WEPCO*); *Puerto Rican Cement Co.* v. *United States EPA*, 889 F.2d 292, 293-294, 297-298 (1st Cir. 1989).

The court of appeals' reading of the regulations' plain language is supported by EPA's explanations, from 1980 on, that the PSD regulations focus on the actual impact of emissions on ambient air, on an annual basis, including by examining a unit's hours of operation. The preamble to the 1980 regulations explains that the regulations measure increases in "actual emissions," calculated in "tons per year," and that a PSD permit is required if plants "increase pollution." 45 Fed. Reg. at 52,700. In addition, preambles to the 1980 and proposed 1983 regulations describe the effect that changing the hours of operation could have on PSD emissions. *Id.* at 52,705; 48 Fed. Reg. 38,747 (1983). In a 1982 settlement agreement with challengers to the 1980 regulations, including Cinergy, EPA agreed to propose to *change* the 1980 regulations to *include* the very hourly emissions rate test that petitioners now contend the regulations already mandated, thus clearly demonstrating EPA's view that the existing regulations did *not* impose such a test. See 54 Fed. Reg. 27,274 (1989); 61 Fed. Reg. 38,268-38,269 (1996); 70 Fed. Reg. 61,098 (2005).

In 1988 and 1989, EPA issued applicability determinations that unquestionably applied a total annual emissions test, resulting in the cases of *WEPCO* and *Puerto Rican Cement*, which endorsed the use of such a test. See *WEPCO*, 893 F.2d at 906, 916 (noting that EPA assumed emissions increases would come "not from an increase in emission rate, but rather from increases in production rate or hours of operation") (quoting EPA Supplemental Determination at 9, *WEPCO*, *supra* (Nos. 88-3264, 89-1339)); *Puerto Rican Cement*, 889 F.2d at

294 (noting that EPA charts made clear "that emissions will increase only if the company operates the new kiln at significantly higher production levels"). In doing so, EPA confirmed—well before initiation of this litigation—that "hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis." U.S. Reply Mem. in Support of Mot. for Partial Summ. J., Exh. 32, at 10 (U.S. Summ. J.) (EPA's 1989 final determination that WEPCO's actions triggered PSD requirements); see *id.* at 12 (an NSPS non-applicability determination "does not affect PSD applicability"); Pet. C.A Supp. App. 259-269 (EPA's 1990 WEPCO remand determination applying actual-to-projected-actual emissions increase test). EPA's interpretation of its own regulations is entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

As a party to the 1982 settlement agreement, and to the filing of industry amicus briefs in *WEPCO* and *Puerto Rican Cement*, Cinergy was well aware of EPA's interpretation. In 1989, an industry briefing paper recognized that EPA's *WEPCO* determination "found that PSD review would be required even though the units were not increasing their emission rate" and that "major repairs and replacements that improve 'reliability' and 'efficiency' but do not increase (and may even *reduce*) emission rates can require a PSD permit." U.S. Summ. J., Exh. 38, Attach. at 1, 8. See *id.* Exh. 28, at 9 (industry amicus brief in *WEPCO* notes that, in its *WEPCO* determination, "EPA emphasized that PSD requirements would apply even where the project merely improved the availability and reliability of the facility, and was not needed to restore lost capacity"). Contrary to petitioners' assertions (Pet. 10), EPA explained its inter-

pretation to the States as well.[3] See Pet. C.A. Supp. App. 153 (1990 EPA letter to the Indiana Department of Environmental Management stating that, for NSR purposes, "[a]nnual emissions are the product of the hourly emissions rate, which is the sole concern of NSPS, times the utilization rate, expressed as hours of operation per year").

ii. Petitioners nonetheless complain (Pet. 11) that the court of appeals "ignored" their argument that "the plain language of the regulations and simple common sense dictate that a project cannot be a 'major modification' if it does not constitute a 'modification' in the first instance." The court of appeals correctly dismissed that argument as "makeweight[]." Pet. App. 8a. Under EPA's regulations, as discussed above, PSD requirements are triggered by a "major modification," which is defined separately from the inapposite definition of "modification" on which petitioners rely. (EPA's use of the term "major modification" as the regulatory trigger for PSD, rather than "modification," derives from the fact that the PSD requirements apply to "major emitting facilities." See 42 Fed. Reg. 57,480 (1977); see generally U.S. Br. at 9, *Duke Energy, supra* (No. 05-848).)

The irrelevance of the regulation on which petitioners rely, 40 C.F.R. 52.01(d), is confirmed by other factors. That regulation is not contained in the relevant SIPs, which provide the applicable law in this case. On August 7, 1980, EPA disapproved Ohio's and Indiana's proposed PSD programs and incorporated by reference

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[3] Petitioners' contention (Pet. 10) that EPA's interpretation constitutes a federal power grab raising "cooperative federalism" concerns is undercut by the fact that 21 States, the District of Columbia, and the national association representing the air pollution directors of all the States supported the United States in *Duke Energy*.

portions of the PSD regulations of 40 C.F.R. 52.21 into the Ohio and Indiana SIPS, which apply here. See 40 C.F.R. 52.793, 52.1884. Because that incorporation did not include Section 52.01(d), that provision is irrelevant. See 40 C.F.R. 52.793, 52.1884; Ohio Admin. Code § 3745-31-01(AAA) and (1)(a)(iv) (2003) (defining "modification" as change that "[i]s otherwise defined as a major modification"); Ind. Air Pollution Control Bd. reg. APC 19 (Feb. 9, 1982); and Ind. Admin. Code tit. 326, r. 2-3-1 (2003) (two different Indiana SIPs, before and after December 6, 1994, contain no separate definition of "modification").

Moreover, the definition of "modification" relied on by petitioners applies only to sources emitting pollutants "for which a national standard has been promulgated under Part 50 of this chapter"—*i.e.*, pollutants for which EPA has established NAAQS. Because the current PSD program is not so limited, that definition could not apply to that program. Cf. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979) (noting that "[t]he language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act").[4]

Nor is petitioners' argument, as they would have it (Pet. 5, 11), based on "common sense." It was not until sometime in 2005—more than 25 years after the 1980 PSD regulations were promulgated—that industry first made the argument proffered here. Indeed, just as industry had never made the regulatory "modification" argument in *Duke Energy* until it filed its merits briefs

[4] Cases like *New York*, *WEPCO*, and *Puerto Rican Cement* did not involve only changes triggering the NSPS hourly emissions test, confirming that the PSD regulations do not require both an NSPS modification and a PSD major modification. See pp. 10-11, *supra*.

in this Court, petitioners had never made that argument in this case until they filed their merits brief in the court of appeals. Every court to address the meaning of "modification" for the PSD program has looked solely to the definition of "major modification." See Pet. App. 2a, 12a; *New York*, 413 F.3d at 14; *WEPCO*, 893 F.2d at 915; *Puerto Rican Cement*, 889 F.2d at 295-297; *Alabama Power Co.*, 636 F.2d at 399-400. Contrary to petitioners' assertions (Pet. 2), it is industry, not EPA, that has invented a new regulatory interpretation for litigation purposes.

iii. Petitioners' other regulatory arguments fare no better. Petitioners argue (Pet. 12) that for purposes of determining whether a project would increase "actual emissions," as measured in "tons per year" under 40 C.F.R. 52.21, EPA's regulations provide that the agency must use, in petitioners' words, "constant, representative hours of operation." As petitioners explain (Pet. 12), holding hours constant in that manner, even when a physical change would actually cause hours to increase, would effectively convert EPA's annual standard into an hourly one.

That contention—which is a wholly implausible way of measuring "actual emissions" in "tons per year" (40 C.F.R. 52.21)—finds no support in EPA's regulations. Under 40 C.F.R. 52.21(b)(21)(ii), the *pre-change* baseline is generally measured based on "actual emissions * * * during a two-year period which precedes the particular date and which is representative of normal source operation." That provision ensures that the pre-change baseline reflects representative *actual* emissions. It does not suggest, in any way, that *post-change* "actual" emissions should be based on a counterfactual assessment of what future emissions would be if post-change hours of

operation were held to pre-change levels (even when they would actually increase because of a change). To the contrary, the regulation stresses that "[a]ctual emissions shall be calculated using the unit's *actual operating hours*, production rates, and types of materials processed, stored, or combusted during the selected time period." *Ibid.* (emphasis added). Thus, the court of appeals correctly concluded that EPA's regulations require consideration of a unit's actual hours of operation, both before and after a physical or operational change. Pet. App. 3a.

Petitioners also contend (Pet. 12) that the court of appeals should have recognized that the regulatory "hours of operation" exclusion from the definition of *physical or operational change* precludes EPA from considering hours of operation in measuring *emissions increases*. Petitioners made no such argument before the Seventh Circuit, which had previously, and correctly, rejected that contention in *WEPCO*, 893 F.2d at 916 n.11.[5] Under EPA's regulations, a "modification" requires both a physical or operational change *and* an increase in emissions. 40 C.F.R. 52.21(b)(2)(i). The provision relied on by petitioners states only that "[a] physical change or change in the method of operation shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 52.21(b)(2)(iii)*(f)*. While that provision excludes increases in the hours of operation from the definition of physical or operational change, it does not exclude such increases from consideration on the separate question whether a physical or

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[5] In their statement of facts, petitioners stated that the regulations provide that the term "modification" does not include "[a]n increase in the hours of operation" of the unit. Pet. C.A Br. 13. But petitioners provided no analysis or argument on that point.

operational change would result in an emissions increase. See 45 Fed. Reg. at 52,704; 57 Fed. Reg. 32,328 (1992). Thus, the court of appeals correctly explained that the exclusion applies where a company runs "the plant closer to its maximum capacity" without making a physical or operational change, but does not apply if "a physical change enables the plant to increase its output." Pet. App. 2a-3a.

iv. Petitioners assert (Pet. 12-13) that the court of appeals ignored prior regulatory interpretations by two subordinate EPA officials. The two 1981 statements, however, pertain to the irrelevant "hours of operation" exclusion discussed above. Even if those statements were read to support petitioners' argument, they could not be reconciled with the regulations' plain language and contemporaneous preamble or with the subsequent interpretation adopted by the EPA Administrator—the head of the agency—and upheld by the Seventh Circuit in the *WEPCO* proceeding. See *WEPCO*, 893 F.2d at 916 n.11. The 1982 memorandum from an EPA regional employee simply states that a "modification [that] does not *cause* any increase in emissions" does not trigger PSD requirements, which is wholly consistent with EPA's longstanding interpretation. Pet. C.A. Supp. App. 283-285. Moreover, as discussed above, EPA has repeatedly expressed its interpretation of the regulations' plain meaning, and petitioners and other members of industry have repeatedly acknowledged that interpretation, since 1980.

v. Petitioners err in concluding (Pet. 2) that EPA's interpretation extends to "commonplace maintenance, repair, and replacement projects." The definition of "major modification" excludes "[r]outine maintenance, repair and replacement." 40 C.F.R. 52.21(b)(2)(iii)(*a*).

Here, the court of appeals noted that petitioners have conceded for present purposes that their plant modifications were not routine maintenance, repair, or replacement. Pet. App. 2a.

b. After determining that EPA's PSD regulations could not reasonably be read to measure emissions increases based on an hourly rate test, the court of appeals correctly rejected petitioners' claim that the CAA *requires* such a reading. Under Section 307(b), a court adjudicating a CAA enforcement action may not invalidate actions of the Administrator, such as the promulgation of the nationally applicable PSD regulations at issue here, if review "could have been obtained" pursuant to a properly filed petition for review in the D.C. Circuit. 42 U.S.C. 7607(b)(2); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980).

Petitioners do not dispute that Section 307(b) bars invalidation of the regulations. Rather, they argue (Pet. 16-17) that they are challenging not the regulations, but a new interpretation of those regulations. As the court of appeals explained, that argument fails because, as discussed above, the regulations' meaning is evident on their face, and they are not reasonably susceptible of the interpretation proffered by petitioners. See Pet. App. 6a. Nor, as discussed above, has EPA changed its interpretation. Instead, petitioners are impermissibly challenging the regulations themselves, no matter how they characterize their challenge.

Indeed, petitioners not only could have obtained review of their claim in a challenge to the regulations' validity in the D.C. Circuit; they did so. In *New York*, *supra*, the D.C. Circuit ruled on numerous petitions for review filed in 1980, 1992, and 2002 to challenge PSD regulations issued in those years. Cinergy was a party

to petitions challenging all three sets of PSD regulations, including the 1980 regulations at issue here. The brief filed by the electric utility industry parties, including Cinergy, expressly argued that the 1980 PSD regulatory definition of modification was unlawful to the extent that it differed from the NSPS hourly rate emissions test. *New York*, 413 F.3d at 18. The D.C. Circuit "reject[ed] this portion of industry's challenge to the 1980 * * * rules." *Id.* at 20.

c. In the alternative, the court of appeals correctly held that petitioners' statutory challenge to EPA's regulations fails on its merits. As that court recognized, the PSD cross-reference to the NSPS statutory definition of "modification" "says nothing about hourly versus annual emissions" and "does not purport to incorporate the agency's [hourly-rate-based] regulatory definition of modifications" under NSPS into the PSD provisions. Pet. App. 6a. The D.C. Circuit has similarly rejected petitioners' argument. *New York*, 413 F.3d at 19.

The court of appeals also correctly rejected the theory relied on by the Fourth Circuit in *United States* v. *Duke Energy Corp.*, 411 F.3d 539, 546-547 (2005), cert. granted, 126 S. Ct. 2019 (2006), which is that Congress's use of identical statutory definitions of "modification" in the PSD and NSPS programs requires EPA to apply the term identically in both programs. The court followed the well-established rule that "[t]he same word can mean different things in the same statute," which is "certainly the case with a vague word like 'modification'" (particularly when that term is defined using other ambiguous terms). Pet. App. 7a. Moreover, the Fourth Circuit's theory is irreconcilable with fundamental principles of deference to agency interpretations of ambiguous statutory text. By directing EPA to employ the

same ambiguous statutory definition of "modification" in two separate regulatory programs, Congress necessarily delegated to EPA the discretion to resolve those ambiguities differently for (or within) each program if the agency reasonably concludes that different approaches would best achieve the purposes of the respective programs.

Even the Fourth Circuit in *Duke Energy* rejected the theory advanced by petitioners here (Pet. 14): that the CAA requires EPA to apply an hourly emissions rate test in determining whether there is an NSR modification. As the Fourth Circuit recognized, the statutory definition of "modification" contains ambiguous terms that delegate to EPA the discretion to determine how emissions increases should be measured. *Duke Energy*, 411 F.3d at 550-551. Thus, that court held only that EPA must apply the same test to both programs; not that it must apply an hourly-rate test to both. *Id.* at 549 n.7. During the seven years before Congress created the statutory PSD program, EPA certainly had discretion to measure emissions increases under the NSPS program alone in different manners for different sources or pollutants, assuming there was a reasonable justification for doing so. Nothing in the 1977 amendments adding the NSR program to the CAA demonstrates a congressional intent to remove such discretion, with respect to either the NSPS or the NSR program.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Environmental Defense* v. *Duke Energy Co.*, No. 05-848, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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